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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/828,548	04/19/2004	Dale B. Schenk	15270J-004747US	3885

20350 7590 06/08/2007
TOWNSEND AND TOWNSEND AND CREW, LLP
TWO EMBARCADERO CENTER
EIGHTH FLOOR
SAN FRANCISCO, CA 94111-3834

EXAMINER

KOLKER, DANIEL E

ART UNIT	PAPER NUMBER
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1649

MAIL DATE	DELIVERY MODE
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06/08/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	Application No. 10/828,548	Applicant(s) SCHENK, DALE B.	
	Examiner Daniel Kolker	Art Unit 1649	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 24 April 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 24 April 2007. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: None.
 Claim(s) objected to: None.
 Claim(s) rejected: 177, 196 and 198.
 Claim(s) withdrawn from consideration: None.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
 12. ☒ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). IDS filed 8/18/06
 13. ☒ Other: See Continuation Sheet.

Continuation of 5. Applicant's reply has overcome the following rejection(s):

1. The objection to claim 177 is withdrawn in light of the amendment which addresses the examiner's concern.
2. The rejection under 35 USC 112 first paragraph for lack of enablement due to lack of complete address of the depository and lack of adequate statement in regards to irrevocable removal of restrictions on public access is withdrawn in light of the amendments and arguments which address the examiner's concerns.
3. The rejection of claim 197 under 35 USC 112 second paragraph is moot as the claim is now canceled.

Continuation of 11. does NOT place the application in condition for allowance because: The remarks and arguments presented after final rejection are not sufficient to overcome the rejection of record under 35 USC 103. The rejection stands for the reasons previously made of record.

Continuation of 13. Other: Several exhibits were filed after final rejection. The following exhibits have been entered:

Exhibit A (copy of cover sheet of previously-filed IDS)

Exhibit B (copy of postcard receipt)

Exhibit C (copy of form 892 from case 10/923471 indicating reference "Chemicon International Catalog" was cited by the PTO)

Exhibit D (copy of declaration addressing biological deposit issue which had previously been submitted to the USPTO)

However, Exhibits E - I have not been entered. These exhibits address the merits of the rejection under 35 USC 103. The evidence will not be entered after final rejection as applicant failed to provide a good and sufficient reason why the evidence is necessary and was not presented earlier

Applicant's arguments as to why articles submitted on the IDS (specifically numbers 631, 632, and 696) should be considered are persuasive. Note a new copy of the IDS filed 18 August 2006 is attached, those references have been initialed indicating they have been considered. With respect to reference 639, applicant argues that the examiner should consider the reference even though the date is missing. As indicated in the final rejection, the examiner has reviewed the content of the reference (as indicated by his initials) but cannot determine if the reference is prior art. Applicant argues that since the reference was cited by a USPTO examiner, Examiner Kolker should determine the date. Examiner Lyles, who initially cited the reference in question, no longer works at the PTO thus it is not possible to confirm with her the date of publication. The reference has been considered but it is unclear whether it constitutes prior art. As the reference is not in proper format for publication on the face of a patent should one issue from this case, it has been crossed off the IDS.

DK
5/31/07



ROBERT C. HAYES, PH.D.
PRIMARY EXAMINER